be worthless and were dishonoured on presentation. I think this is the proper and correct view of this transaction.

All the plaintiffs did, to use the not inapt phrase of Mr. Godwin's, was to make a mistake as to their customer's credit worthiness.

In essence the transaction was, in my opinion, one of obtaining the shares by false pretences and not by theft within the meaning of the policy. Under English law it would be regarded and punished as false pretences and under Singapore law as cheating and in neither case as theft either within the meaning of the policy or in the fullest sense of the term itself.

Furthermore in considering whether this was a theft within the meaning of the policy it is to be observed that in addition to the six perils insured against to which I have already alluded there is a further provision in the policy insuring against "any other loss whatsoever through the theft, fraud, larceny or other dishonesty of or forgery by any officer, clerk or servant of the assured". This provision is limited to the assured's officials and employees and does not extend to other persons.

The inclusion of the words 'fraud' and 'other dishonesty' in a later part of the policy would seem to indicate that they were never intended to be included in the word 'theft' when used in the earlier part of the policy where the other six perils insured against are specified and that their omission was deliberate and intentional. It would have been a simple matter to have included them along with the six perils already enumerated or to have added to them the words "or by being taken out of their possession or control by any fraudulent means" as was the case in *Pawle & Co.* v. *Bussell, supra,* if that had been the intention.

It was also argued by Mr. Godwin that even if it was held that this transaction amounted to a loss by theft within the meaning of the policy it was not in respect of a loss of a security covered by the policy as the plaintiffs were merely deprived of the proceeds of the cheques. In support of this proposition he cited *Eisinger* v. *General Accident Fire and Life Assurance Corporation Limited.*[4] Whether the underwriters would wish to take advantage of this technical point in the event of it being held to be sound is a matter on which I do not propose to speculate. Suffice it to say that in view of the conclusion at which I have arrived on the major issue in this case it is unnecessary nor do I propose to deal with it.

Finally Mr. Smith at the close of the case in his final reply referred me to a passage in the *English and Empire Digest Replacement* Volume 15 p. 1043 para. 10,270 under the heading "By giving valueless cheque" where the case of *R.* v. *Stewart* [5] was referred to. Curiously enough that case was also cited in argument on behalf of the plaintiffs before Bailhache, J. in *Pawle & Co.* v. *Bussell, supra,* in support of the proposition that the facts in that case, to which I have already referred, disclosed larceny by a trick. The decision in *R.* v. *Stewart* was that where goods ordered by a party to be sent to a particular place are so sent by a servant, with specific instructions from the owner not to part with them without the price, and the servant is induced by the buyer to receive a valueless cheque as payment, the case is one of larceny. That is not the case here. Admittedly there was a general rule in the office of the plaintiff firm that securities should not be handed over to customers unless paid for in cash or by a bank cheque or unless the cheque had first been cleared. But that rule was a flexible one and in any event it had no application to a known and good customer into which category Lim Pow Tian undoubtedly came. The evidence was that he had previously had substantial dealings with the plaintiff firm amounting to some $60,000 odd or more all of which had been satisfactory. In the case of such a customer his cheques would be accepted and this I have no doubt was in accord with the usual practice of stockbroking firms.

In the result therefore for the reasons which I have indicated the plaintiffs' claim fails. There will be judgment for the defendant and the plaintiffs' claim must be dismissed with costs.

Claim dismissed.

Solicitors: *L. A. J. Smith; Donaldson & Burkinshaw.*

LEE SEM YOONG v. LEONG YOONG

[O.C.J. (Gill J.) April 28, 1967]

[K.L. — Civil Suit No. 1189 of 1964]

Landlord and Tenant — Licensee — Termination of — Ejectment — Trespass — Damages.

Practice and Procedure — Res judicata — Same parties — Matter in issue never finally decided by previous court.

In this action the plaintiff sought to eject the defendant from the premises in question and to recover damages for trespass. The plaintiff contended that the defendant occupied the said premises as a licensee at all material times and that, such licence having been determined by a written notice on July 24, 1964, requiring him to vacate the said premises on or before August 31, 1964, he had remained on the land as a trespasser. The learned judge found as a fact that the defendant paid no rent and that the temporary buildings on the land were erected after September 1952.

Held: on the facts, the defendant occupied the land as a licensee. His licence having been duly determined by a written notice, he continued to stay on the land as a trespasser, therefore the plaintiff was entitled to damages.

For the doctrine of *res judicata* to apply, a defendant has to show that there was a former suit between

the same parties for the same matter and upon the same cause of action, and also that the matter directly and substantially in issue has been heard and finally decided by the court which heard it.

Where the former suit between the parties was for the same matter and upon the same cause of action, but the matter directly and substantially in issue was never finally decided,

Held: the plea of *res judicata* was not available to the defendant.

Case referred to:—

(1) *Andavan* v. *Thong Nyik Lin* [1966] 1 M.L.J. 57.

CIVIL SUIT.

L. Kandan for the plaintiff.

K. Raja Nayagam for the defendant.

Gill J.: This was an action by the plaintiff suing as executor and trustee of the estate of Lee Lip Sang deceased for the ejectment of the defendant from premises No. 15A, Jalan Perkins, Kuala Lumpur situate on land held under Certificate of Title No. 25022 for Lot No. 1753, section 41, Township of Kuala Lumpur and for damages. The action was based on the plaintiff's contention that the defendant occupied the said premises as a licensee at all material times and that, such licence having been determined by a written notice to the defendant on 24th July, 1964 requiring him to vacate the said premises on or before the 31st of August, 1964, he had remained on the land as a trespasser.

It was common ground that Lee Lip Sang, who died on 28th November, 1957, bought the land in question from the liquidator of Eu Properties (Selangor) Ltd. and Eu Tong Sen Ltd., the previous registered proprietors, under an agreement of sale dated the 21st of May, 1957, and that in pursuance of that agreement the plaintiff became the registered proprietor as representative some time prior to 24th July, 1964. The plaintiff before becoming such registered proprietor had on 15th May, 1963 determined the defendant's licence and thereafter commenced proceedings for the eviction of the defendant in the sessions court, Kuala Lumpur in civil action No. 291 of 1963, but his action was dismissed on the ground that he was not then the registered proprietor of the land.

The defence put up by the defendant to the action in this court was that he had been in occupation of the premises during and since the Japanese occupation as a tenant, that the premises are premises within the Control of Rent Ordinance, 1956 and that by reason of the previous action in the sessions court, Kuala Lumpur this suit was *res judicata*. Thus, there were three issues raised on the pleadings and the onus was on the defendant to prove that he was in fact a tenant of the premises and that the premises were subject to the Control of Rent Ordinance, 1956.

On the evidence produced by both parties before me at the trial of the action I found as a fact that the defendant went into occupation of the land in question at some time after his retirement on 30th September, 1952 from the partnership business of K. S. Motor Service at 222-B, Pudu Road, Kuala Lumpur, and put up thereon some temporary buildings in which he has since been residing and carrying on business as a motor car repairer. In making that finding of fact I accepted in toto the evidence of Voon Jan Shin (P.W.5) as to the premises in Batu Road at which the defendant was carrying on a motor repairing business under the style of Chop Onn Choon in partnership with Foo Koon Seng (the witness's brother-in-law) and another man named Yong Nam, before he shifted to Pudu Road. I regarded Voon Jan Shin as an independent witness and a totally disinterested party, although he was called by the plaintiff. It was clear from the evidence that Chop Onn Choon faced Batu Road and that the defendant used to enter it from Batu Road. The land in question, on the other hand, faced Jalan Perkins and not Batu Road. What faced Batu Road was the bungalow in which Yap Tai Nyen lived. That bungalow has since been pulled down and on its site there is now a Shell petrol station.

I rejected the evidence of the defendant that his family shifted to 15A, Jalan Perkins some time in 1947 after he removed his business to Pudu Road because I considered that part of his evidence as a deliberate lie in order to show that he has been on the land since 1947. This evidence of his, to my mind, was completely nullified by the Form B in relation to the registration of changes in business (P.12) which he filed with the Registrar of Businesses on 28th August, 1953. He confirmed the accuracy of the statements made in that form, and one of the changes notified in that form was the change of his residence from 180 Main Street, Ampang to 15A, Perkins Road, Kuala Lumpur.

I also found as a fact that from the time the defendant went into occupation of the land he never paid any rent for the land to anybody. His story was that he paid the rent to Yap Tai Nyen who, he thought, was the owner of the land. His witness, Manickam, said that he paid rent on behalf of the defendant sometimes to Yap Tai Nyen and that this rent was paid at the office of the defendant at High Street, Kuala Lumpur. The truth of the matter was that both of them were lying as regards the payment of rent to Yap Tai Nyen. That no rent was paid by the occupiers of the buildings on the land was confirmed by the letter of the liquidator of Eu Properties (Selangor) Ltd. dated 20th November, 1963 (P.6). The signature on this letter was identified by Mr. E. D. Couper (P.W.4). The defendant was unable to produce any receipt or any other document to show that he had been paying rent and that he was the tenant of the

premises. It is true that the plaintiff offered him $3,000 as compensation to vacate the land, but this offer did not make the defendant a tenant. I did not believe the story of the defendant or his witness that there was mention of rent in the document which was prepared for the signature of the defendant when the sum of $3,000 was offered to him. The defendant wrote the letter dated 1st May, 1963 (page 7 of AB.1) in which he mentioned that he had been paying rent of $20 a month up to 31st December, 1962. This was an attempt on his part to establish that he had been paying some sort of rent because he knew at that time that the plaintiff wanted him to vacate the land.

The conclusion at which I arrived on the evidence before me was as follows. The repair shop at Pudu Road was on land belonging to Eu Tong Sen Ltd. When the defendant retired from that business, he was allowed to build some sheds on the land at Jalan Perkins, which also belonged to Eu Tong Sen Ltd., so as to enable him to carry on business as a motor car repairer. He paid no rent to Eu Tong Sen Ltd. or to Yap Tai Nyen, who himself was occupying the bungalow on the land without paying any rent. The defendant had been an employee of Lee Lip Sang. He informed Lee Lip Sang that the land was for sale, as he wanted Lee Lip Sang to buy the land so that he could continue to stay on the land, because if anyone else had bought the land he might have had to go. He acted as broker in connection with the sale and was paid his comission by the plaintiff after Lee Lip Sang's death. The defendant's own story is that Lee Lip Sang told him that he would allow the defendant to stay on if he bought the land. Lee Lip Sang was true to his word and let the defendant stay on, obviously because at that stage he had no plans for the development of the land or for its sale. After Lee Lip Sang's death the plaintiff let the defendant stay on because it was he who introduced them to the owners of the land for its sale and because he was a former employee of his father and an old friend. The defendant agreed that he would leave the land when he was asked to do so. But, having established a flourishing repair shop, he did not want to move when asked to do so in 1963, and then set about to put up his present story that he has been a tenant of the premises. I did not accept a word of his story that he paid rent to the plaintiff or the plaintiff's father.

Having found as a fact that the defendant paid no rent, I held that he occupied the land as a licensee. His licence having been duly determined by a written notice, he continued to stay on the land as a trespasser. I therefore made an order that he do give vacant possession of the land on or before 30th April, 1967.

Even if there was a tenancy as alleged by the defendant, it was validly determined by the notice to quit dated 24th July, 1964. His contention was that he was a tenant of the land and not of the premises. As I have already stated, the temporary buildings on the land were erected after September 1952. The Control of Rent Ordinance, 1956 therefore had no application whatsoever to the facts of the present case.

The next point which I had to consider was the defence of *res judicata* set up by the defendant. For the doctrine of *res judicata* to apply, a defendant has to show that there was a former suit between the same parties for the same matter and upon the same cause of action, and also that the matter directly and substantially in issue has been heard and finally decided by the court which heard it. To see what was decided in the previous case it is necessary to look at the judgment itself (*per* Ismail Khan J. in *Andavan* v. *Thong Nyik Lin* [1]).

It is clear that the former suit between the parties in the sessions court was for the same matter and upon the same cause of action, but the matter directly and substantially in issue was never finally decided by that court. The judgment of the learned president in that court said:—

> "In the course of the hearing of this suit it came to light that the land, subject matter of he case, was transmitted to the liquidator Charles William Tresise as representative on 2nd June, 1955 and that the plaintiff's deceased father executed an agreement Ex. P.2 to purchase this land on 21st May, 1957 paying part of the purchase price. Although the plaintiff may have a good claim for this land the title is still in the name of the liquidator. It is not within this court's jurisdiction to decide the question of title if there should be a dispute nor has this court power to give an order for a specific performance.
>
> In my opinion the plaintiff has sought a wrong course of action (though this was never even mentioned by the defence). If any order is made by this court for vacant possession to be delivered to the plaintiff it would not only be unenforceable, but also illegal. For such an order would result in this court taking the land belonging to the liquidator and delivering it to plaintiff. Under these circumstances and for the reasons mentioned I dismissed the action with costs."

It is abundantly clear from the above judgment that the learned president did not go into the merits of the case and dismissed the action on the ground that the plaintiff was then not the registered owner of the land and that in his opinion he had no jurisdiction to hear the case on its merits. Thus, the plea of *res judicata* was not available to the defendant in the present case.

As regards damages, the plaintiff entered into an agreement dated the 1st of July, 1963 to sell the land to one Loh Boon Siew (P.W.1) for $240,000 which was subsequently increased to $280,000. Loh Boon Siew paid a deposit of $60,000 on the date of the agreement, leaving a balance of $220,000 to be paid when the plaintiff was in a position to hand over vacant possession. Pending the handing over of vacant possession,

the plaintiff has had to pay half the assessment on the land. He has been unable to deliver vacant possession since 1st September, 1964, by which time he had already become the registered proprietor of the land, because of the defendant's refusal to quit. The plaintiff has been kept out of his money since the 1st of September, 1964. He is therefore entitled by way of damages to the amount of interest which that money would have earned during all this period. At the rate of 6% per annum the amount works out at $34,100. He has also had to pay a total sum of $11,750 as assessment. I therefore held that the plaintiff was entitled to a sum of $45,850 by way of damages. I also allowed further damages at the rate of $1,100 a month, based on the same rate of interest, for any period after 1st May, 1967 that the defendant remains in possession. I gave judgment for the plaintiff accordingly with costs, in addition to the order that the defendant and all those who hold from him do deliver vacant possession of the land on or before 30th April, 1967.

Order accordingly.

Solicitors: *Shearn, Delamore & Co.; Rajanayagam & Liew.*

EE KIM KIN v. THE COLLECTOR OF LAND REVENUE, ALOR GAJAH

[O.C.J. (Ismail Khan J.) April 29, 1967]

[Malacca — Miscellaneous Application No. 1 of 1961]

Administrative Law — Mandamus — Delay in taking action — Whether reference barred.

Practice and Procedure — Action for mandamus — Recourse to most convenient practice — Practical reasons — Technicalities — Proper administration of justice — R.S.C. 1957, O. 53 & O. 72 r. 2.

Land Acquisition — Inquiry — Claim for compensation — Land Acquisition Ordinance, (S.S. Cap. 128) and Land Acquisition Act, 1960, ss. 10 & 14.

This was an application for an order of *mandamus* directing the collector either to hold an inquiry under section 10 of the Land Acquisition Act in respect of a claim for compensation by the applicant, or to issue an award under section 14 of the Act in respect of certain land acquired by the State Government under the Land Acquisition Ordinance. The applicant, a person interested in the land acquired, claimed that he was never given the opportunity of being heard, thus rendering the proceedings null and void; and he alleged that no formal award was ever made by the collector in respect of his interest which had been so acquired.

The land in question was acquired for road improvement in 1956. At the inquiry held under section 10 of the Ordinance one *LSS* agreed to the award of $8,714.50 of which $5,950 was to go to the applicant as his share of compensation. The applicant admitted that he was present at the land office on the day of the inquiry, but he did not take part and was never heard as he was told to stay out. In due course the applicant received payment of his share of compensation. After receipt thereof with full knowledge as to what payment was for, he took no action until approximately a year later in 1957 when he addressed a letter to the District Officer requesting that action be taken to prevent risk of damage to his bungalow by reason of the proximity of the new highway.

Held: (1) as the applicant had accepted the compensation pursuant to the award he was estopped from saying it was not an award;

(2) the delay of over 4½ years presented an insuperable obstacle barring any reference to the court. This obstacle cannot be circumvented by resort to an application for *mandamus* because the application must rest strictly on the grounds which had been put forward and no other.

Observations on recourse to the most convenient practice commends for practical reasons.

Cases referred to:—

(1) *Nana Ofori Atta II* v. *Nana Abu Bonsra II* [1957] 3 W.L.R. 830.

(2) *Verschures Creameries Ltd.* v. *Hull and Netherlands Steamship Co. Ltd.* [1921] 2 K.B. 608, 611.

APPLICATION FOR *MANDAMUS.*

F. K. Sellar for the applicant.

Mohamed Salleh bin Abbas (Legal Adviser, Malacca) for the respondent.

Cur. Adv. Vult.

Ismail Khan J.: This is an application by way of motion for an order of *mandamus* directing the Collector of Land Revenue, Alor Gajah, either to hold an inquiry under section 10 of the Land Acquisition Act, 1960, in respect of a claim for compensation by the applicant, or to issue an award under section 14 of that Act in respect of a certain parcel of land acquired by the Government of the State of Malacca under the provisions of the Land Acquisition Ordinance (S.S. Cap. 128) which Ordinance has now been repealed and replaced by the 1960 Act.

As grounds for this application, it was said, first, that the applicant, a person interested in the land acquired, was never given the opportunity of being heard at a purported inquiry held by the collector, thus rendering the proceedings null and void; secondly, that no formal award was ever made by the collector in respect of the applicant's interests which had been so acquired.

The land in question was a portion of Lot 12 comprised in S.L.G. 21798 situate at Melekek in the district of Alor Gajah. Lot 12 itself was part of an estate of over 200 acres owned by one Lai Sai Siong and another who applied in May, 1955, for the sub-division thereof into a number of lots of approximately five acres each. By an agreement dated 11th May, 1955, the applicant purchased from them two adjoining parcels of land about 10 acres in total area including an estate bungalow thereon for $8,300, and other purchasers bought the remainder.

On 18th October, 1956, appeared *Gazette* Notification No. 252 that purchases of Lot 12 and Lot 1141 were acquired by the State Government for road improvement. This